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IN THE
United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEB 14 2003

GENERAL COUNSEL
OF COPYRIGHT

No. 02-1220

INTERCOLLEGIATE BROADCAST SYSTEM, A RHODE ISLAND NON-PROFIT
CORPORATION AND HARVARD RADIO BROADCASTING COMPANY, INC. A
MASSACHUSETTS ELEEMOSYNARY CORPORATION, ET AL.

Petitioners

v.

James H. Billington, Librarian of Congress, Respondent

Respondent

Consolidated with 02-1244, 02-1245, 02-1246, 02-1247, 02-1248, 02-1249

Recording Industry Association of America, Inc., Intervenor

**JOINT BRIEF PROPOSAL OF LICENSEE PETITIONERS THAT
PARTICIPATED IN THE CARP PROCEEDINGS BELOW**

Pursuant to this Court's Order of January 14, 2003, Petitioners America Online, Inc. ("AOL"), Listen.com ("Listen"), Live365 Inc. ("Live365"), The National Religious Broadcasters Music License Committee ("NRB") and Salem Communications Corp. ("Salem") (collectively the "CARP Participant Licensee Petitioners") submit the following proposal to govern the briefing of these cases.

This appeal involves the determination of royalty rates and terms for services transmitting eligible nonsubscription transmissions of sound recordings as provided for in sections 114 and 112 of the Copyright Act, 17 U.S.C. §§ 114, 112, as amended by the Digital Millennium Copyright Act of 1998 ("DMCA"), for two

consolidated time periods. Docket No. 2000-9 DTRA 1&2. The proceeding was the first ever of its kind, and involved 21 licensee services spanning a number of different business models (e.g., webcasting, simulcasting of broadcast radio station programming) participating on the “Licensee” side, against the Copyright Owners and Performers represented by the Recording Industry Association of America (“RIAA”), the American Federation of Television and Radio Artists (“AFTRA”), the American Federation of Musicians (“AFM”), and the Association For Independent Music.

Preliminarily, we note that five separate and different groups of statutory licensees have filed petitions appealing from the Librarian’s order or sought to intervene in this appeal. Each of these groups has its own distinct interests, as well as strongly held views and approaches to this case. However, broadly speaking, these petitioners/intervenors (collectively the “Licensee Petitioners/Intervenors”) fall into two categories: (i) entities that actually participated in the CARP proceedings below (the “CARP Participant Licensee Petitioners”) and (ii) entities that did not participate in the CARP below, but have sought to appeal or intervene to assert a series of arguments based on constitutional rights, public policy and procedure, all outside the scope of the CARP record below (the “Non-Participant Petitioners/Intervenors”).

The CARP Participant Licensee Petitioners have a clear and unchallenged statutory right to appeal the Librarian’s decision, pursuant to 17 U.S.C. § 802(g). The Librarian has challenged the standing of the Non-Participant Petitioners/Intervenors.

In response to this Court’s January 14 Order, all five groups of Licensee Petitioners/Intervenors have conferred repeatedly in an effort to eliminate any possible

duplication and propose the most streamlined possible briefing to the Court.¹ The five groups of Licensee Petitioners/Intervenors are prepared to limit themselves to two briefs, as more fully delineated below, which would address entirely non-overlapping universes of arguments and issues.

The CARP Participant Licensee Petitioners respectfully propose as follows:

Petitioners'/Intervenors' Opening Briefs:

- To be filed 60 days from the issuance of a scheduling order
- CARP Participant Licensee Petitioners to file a principal brief of not more than 14,000 words
- Non-Participant Licensee Petitioners/Intervenors to file a principal brief
- Copyright Owners and Performers to file a principal brief of not more than 14,000 words²

Librarian's Responsive Brief:

- To be filed 60 days after Petitioners'/Intervenors' Opening Briefs
- Not to exceed 28,000 words

Petitioners' Reply Briefs:

- To be filed 30 days after Librarian's brief
- CARP Participant Licensee Petitioners to file a reply brief, which may also include a response to the Copyright Owners and Performers principal brief, of no more than 10,000 words
- Non-Participant Petitioners/Intervenors to file a reply brief

¹ In addition, all of the parties conferred on multiple occasions in an effort to submit a joint proposal, but were unsuccessful.

² We have been advised that certain Performers –AFTRA and AFM – may wish to submit a separate (joint) principal and reply brief apart from the main Copyright Owner and Performers' submissions in order to address a single matter as to which they are adverse to the RIAA/ Soundexchange, Inc. We have no objection to that, provided such brief is limited in subject matter to such issue (in which event we would not oppose a separate briefing opportunity for AFTRA/AFM of up to 3,000 words for said parties' principal and reply briefs).

- Copyright Owners and Performers to file a reply brief, which may also include a response to the other petitioners' principal briefs, of no more than 10,000 words

DISCUSSION

1. **Number of Briefs and Page Limits.** The above proposal calling for two briefs among the five Licensee petitioner groups (with the word limits designated above) is amply warranted and necessary under the circumstances herein. The brief for CARP Participant Licensee Petitioners will present arguments based entirely on the record below and the errors in the Librarian's ruling based on that record.³ In contrast, the brief for the Non-Participant Petitioners/Intervenors will address issues of constitutional rights, public policy and procedure, including appealability and standing issues that this Court directed (in its Order dated January 14, 2003) be addressed in such Petitioners'/Intervenors' merits briefs. As such, these two groups of Licensee Petitioners/Intervenors propose to submit briefs comprised entirely of independent arguments with absolutely no danger of repetitious submissions.

Petitioners normally are allotted 14,000 words for principal briefs. D.C. Cir. R. 32(a)(7) and Fed. R. App. P. 32(a)(7). In the instant case, it is indeed a challenging task for the several separate entities constituting the CARP Participant Licensee Petitioners (which had separate counsel and frequently presented separate arguments in the CARP below) to limit their merits brief on this appeal to 14,000 words. That is because of the complexity of the CARP proceedings below and the substantial

³ This brief will not address standing issues except to address (very briefly, to occupy one footnote) the Librarian's motion to dismiss against AOL, claiming that AOL was not a participant in the CARP proceeding below. Said motion is based on a pure technicality, insofar as there is no dispute that AOL's wholly-owned subsidiary, Spinner, was such a "party" even under the Librarian's interpretation of what constitutes "any aggrieved party bound by the determination."

record in that proceeding. Prior to the hearings, each side submitted their direct cases, which included voluminous written statements and expert reports. The CARP then conducted 31 days of hearings (taking up over 15,000 pages of hearing transcripts) in which a total of 49 witnesses testified. All the parties submitted extensive findings of facts and conclusions of law, and replies thereto.

Ultimately, the CARP published a 135-page report based upon the massive record before it. Both sides appealed to the Librarian, and the Librarian's decision forms the basis for the present appeal. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings" in Copyright Office Docket No. 2000-9 CARP DTRA 1&2.

Pursuant to the Court's August 9, 2002 Order, the CARP Participant Licensee Petitioners will address four main issues in their appeal, which will require both (i) a discussion of the extensive factual record to set the framework for this Court's analysis of the issues on appeal, and (ii) a presentation of the arguments upon which the CARP Participant Licensee Petitioners will rely in seeking reversal of the Librarian's determination.

In light of the above circumstances, the CARP Participant Licensee Petitioners respectfully submit that limitation of their brief below the normal 14,000 word allotment would unreasonably interfere with their right to present their appeal, a right granted by Congress. 17 U.S.C. § 802(g). Further, it surely would be inappropriate to impose such limitation by reason of the presence in this appeal process of the Non-Participant Petitioners/Intervenors. The latter entities seek to raise arguments entirely unrelated to the CARP Participant Licensee Petitioners' arguments in favor of fair royalty

rates and terms determined pursuant to the CARP process in which they participated (at enormous expense in terms of money, time and resources). The Non-Participant Petitioners/Intervenors challenge that very process and, thus, cannot be said to be, in any meaningful sense, “aligned” with the CARP Participant Licensee Petitioners. Further, there is absolutely no overlap in the presentations that these groups of Petitioners will be making.⁴

It would also be manifestly unfair if the CARP Participant Licensee Petitioners were forced to “cede” any of their otherwise applicable 14,000 word allotment to the Non-Participant Petitioners/Intervenors. We understand that the Copyright Owners and Performers will be seeking (and have allotted in our proposal herein) the full 14,000 word complement to attack the same record and Librarian decision that the CARP Participant Licensee Petitioners are challenging. Surely, as wholly adverse cross-petitioners challenging the identical record and determination below, the CARP Participant Licensee Petitioners should not be made to limit their appeal presentation to a fewer number of words than are available to the Copyright Owners and Performers, merely because Non-Participant Petitioners/Intervenors have surfaced seeking to raise arguments entirely extraneous to the record (and entirely extraneous to the arguments to be advanced by the CARP Participant Licensee Petitioners).⁵

⁴ Therefore, even were they to be considered “aligned,” there is no rationale for a shared page limitation, which typically is justified by the avoidance of duplication and repetition in the presentations made to the Court.

⁵ This is especially the case where it is not even assured that this Court will recognize the standing of the Non-Participant Petitioners/Intervenors to make the non-record public policy and constitutional process arguments they seek to raise.

The foregoing addresses the need of the CARP Participant Licensee Petitioners to have a separate submission of up to 14,000 words for their principal appeal brief. We note that the Non-Participant Petitioners/Intervenors ordinarily would be allocated 8,750 words as intervenors (D.C. Cir. R. 32(a)(3)), and we understand that they may be seeking additional pages in their role as petitioners. We take no position on the appropriate page limit for the Non-Participant Petitioners/Intervenors, on the condition that their presentation be non-overlapping with, and not reduce the pages allocated to, the CARP Participant Licensee Petitioners. We have included provision for such a brief in our proposal.

In light of the fact that the Librarian's opposition brief in response to all Petitioners/Intervenors will presumably contain one integrated Statement of the Case and factual presentation, and that there will presumably be substantive responses that apply to multiple petitioners (e.g., concerning the standard of review), we submit that a "word for word" allotment providing the Librarian with the same aggregate number of words as is allotted to the Petitioners/Intervenors as a whole is neither necessary nor warranted. Thus, while the proposal set forth herein provides for in excess of 28,000 words among the three Petitioner/Intervenor groups (excluding for these purposes any separate AFTRA/AFM submission), we believe that the in-common presentation that the Librarian will make in its Statement of the Case, factual analysis and some arguments, suggest that a 28,000 word allotment is appropriate.

Regarding the reply submissions, we have proposed that the CARP Participant Licensee Petitioners and Copyright Owners and Performers each receive 10,000 words, instead of the usual 7,000 words. D.C. Cir. R. 32(a)(7) and Fed. R. App.

P. 32(a)(7). The rationale for such is as follows. The CARP Participant Licensee Petitioners and Copyright Owners and Performers will be both replying to the Librarian and submitting a response to the principal brief of the cross-petitioning petitioners. This circumstance, we submit, warrants the increase in words allotted for a reply to 10,000, provided the brief is apportioned in a manner such that approximately half is dedicated to a response to the Librarian, and half is dedicated to a response to the other petitioners.

Briefing Schedule. In order responsibly to address the number of issues presented on these appeals, the size of the record and complexity of the subject matters at issue, the CARP Participant Licensee Petitioners propose: that the Petitioners/Intervenors have sixty days from the date of issuance of the Court's scheduling order to submit their reply briefs; that the Librarian have sixty days to respond; and that the Petitioners/Intervenors then have thirty days in which to file their reply submissions.

Respectfully submitted,

Dated: February 13, 2003

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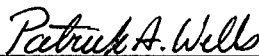
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